

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

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|---|---|--------------------------|
| HENRY JOINER |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | CASE NO. 2:09-CV-160-WKW |
| |) | |
| MICHAEL J. ASTRUE, <i>Commissioner of</i> |) | |
| <i>Social Security, et al.,</i> |) | |
| |) | |
| Defendants. |) | |

ORDER AND RECOMMENDATION OF THE MAGISTRATE JUDGE

On 27 February 2009, Henry Joiner, an inmate incarcerated at the Bullock County Correctional Facility in Union Springs, Alabama, filed a Complaint, Brief in Support, and an application for leave to proceed *in forma pauperis*. (Doc. #1-3); *see* 28 U.S.C. § 1915(a). Pursuant to the directives of 28 U.S.C. § 1915(g), a prisoner is not allowed to bring a civil action or proceed on appeal *in forma pauperis* if he “has, on 3 or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.”¹ Plaintiff has previously violated the provisions of 28 U.S.C. § 1915(g). Accordingly, the undersigned denies the application for leave to proceed *in forma*

¹In *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998), the Court determined that the “three strikes” provision of 28 U.S.C. § 1915(g), which requires frequent filer prisoner indigents to prepay the entire filing fee before federal courts may consider their cases and appeals, “does not violate the First Amendment right to access the courts; the separation of judicial and legislative powers; the Fifth Amendment right to due process of law; or the Fourteenth Amendment right to equal protection, as incorporated through the Fifth Amendment.”

pauperis and recommends that this case be DISMISSED.

I. DISCUSSION

Court records establish that Plaintiff, while incarcerated or detained, has on at least three occasions had civil actions and/or appeals dismissed as frivolous, malicious, or for failure to state a claim and/or for asserting claims against defendants who were immune from suit pursuant to the provisions of 28 U.S.C. § 1915. The cases on which the court relies in finding a violation of § 1915(g) include: (1) *Joiner v. Johnson, et al.*, Civil Action No. 7:99-849-SCP (N.D. Ala. 1999); (2) *Joiner v. Hayes, et al.*, Civil Action No. 2:05-CV-478-MEF (M.D. Ala. 2005); and (3) *Joiner v. Montgomery Police Dept., et al.*, Civil Action No. 2:05-CV-661 (M.D. Ala. 2005).

The Court has carefully reviewed the claims presented in the instant action. Plaintiff requests the Court review and reverse the denial of his claim for Social Security benefits and to allow him to initiate a lawsuit “against the Defendants responsible for [his] disabilities.” (Doc. #1 at 3). The Plaintiff’s claims do not allege nor in any way indicate that Plaintiff “is under imminent danger of serious physical injury” as is required to meet the imminent danger exception to the application of 28 U.S.C. § 1915(g). *See Medberry v. Butler*, 185 F.3d 1189, 1193 (11th Cir. 1999). An action appealing the denial of social security benefits is not exempt from the three-strikes provision of §1915, nor does “the withholding of social security benefits [] constitute conduct which places a person under imminent threat of serious physical injury.” *Sabedra v. Social Sec. Admin.*, 2008 WL 5203709, *2 (N.D. Tex. Dec. 11, 2008); *see also Valdez v. Commissioner of Social Sec.*, 2009 WL 562888 (S.D. Tex. March

4, 2009).

Based on the foregoing, the Court concludes that Plaintiff's motion for leave to proceed *in forma pauperis* is due to be denied and this case dismissed without prejudice for Plaintiff's failure to pay the requisite \$350.00 filing fee upon the initiation of this cause of action. *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002) (“[T]he proper procedure is for the district court to dismiss the complaint without prejudice when it denies the prisoner leave to proceed *in forma pauperis* pursuant to the provisions of § 1915(g)” because the prisoner “must pay the filing fee at the time he *initiates* the suit.”)(emphasis in original).

II. CONCLUSION

In light of the foregoing, it is

ORDERED that the Motion for leave to proceed *in forma pauperis* (Doc. #3) is DENIED.

It is the RECOMMENDATION of the Magistrate Judge that this case be DISMISSED without prejudice for Plaintiff's failure to pay the full filing fee upon the initiation of this case.

It is further

ORDERED that the parties shall file any objections to this Recommendation on or before **7 April 2009**. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation to which the party is objecting. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and advisements in the Magistrate Judge's Recommendation shall bar the party from a de novo determination by the District Court of issues covered in the Recommendation and shall bar the party from attacking on appeal factual findings in the Recommendation accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 24th day of March, 2009.

/s/ Wallace Capel, Jr.
WALLACE CAPEL, JR.
UNITED STATES MAGISTRATE JUDGE